LAWS OF A FOREIGN STATE—PROOF OF SAME.—By statute in Virginia, whenever it becomes necessary to ascertain what the law, *statutory or otherwise,* of another State or country, or of the United States, was at any time, the court, judge, or other judicial officer or tribunal, is required to take judicial notice of the same.[1]

The words "statutory or otherwise" clearly show that it was the intent of the legislature that courts should take judicial notice of both the common law and "decision law" as well as the statutory law of a foreign State or country. This is a very radical change from the previously existing state of the law in Virginia, and the wisdom of such a statute may well be questioned by the members of the bar, in view of the great difficulty which might arise in ascertaining the course of decisions and the common law of other States.

EVIDENCE—PRIOR CONVICTION OF ACCUSED.—In felony cases in Virginia, the subject of prior conviction may no longer be made a matter of inquiry on the trial of the principal offense. Section 5054 of the Code of 1919, by providing that the superintendent of the penitentiary, after conviction of the accused and his confinement therein, shall give information of prior conviction to the Circuit Court of the City of Richmond, and that all proceedings for increase of sentence because of such prior conviction must be had therein, has effectually barred inquiry as to such prior conviction at the trial. This is much to be commended, as the fact of a prior conviction of a felony necessarily influenced the verdicts of juries in criminal cases.

RIGHT OF GOVERNOR TO SURRENDER FUGITIVE ON REQUEST OF A FOREIGN POWER—VIRGINIA CODE, 1919, § 5060.—In Virginia it is enacted that the Governor, while not thereto required, may in his discretion surrender a person charged with a crime committed in a foreign country, upon the requisition of the duly authorized agents of such country.[1]

Apparently this section attempts to confer on the executive head of the State a power which pertains to the foreign relations of the United States. Such power was undoubtedly conferred on the federal government by the Constitution of the United States as a part of the treaty-making power, the power of appointing and receiving ambassadors and other public ministers, etc. This power is conferred on the President by Article II, Sec. 2, of the aforementioned Constitution, and the power of decid-

[1] Acts, 1918, c. 182, p. 315.
[1] Va. Code, § 5060.

ing whether a fugitive from a foreign nation should or should not be surrendered was necessarily a part of the powers thus granted, and therefore a function of the political or executive department of the United States.[2]

Such power in the States is incompatible and inconsistent with the powers conferred on the federal government. Article I, Sec. 10, Clause 2 of the United States Constitution prohibits any State, without the consent of Congress, from entering into any agreement or compact with a foreign power. It is hardly necessary to state that Congress has in no way consented to agreements between the individual States and foreign powers, yet should any foreign power request the Governor of Virginia to surrender a fugitive from its laws, a compliance with such request would clearly be an agreement or compact with a foreign power.[3]

The case of *Holmes* v. *Jennison, supra,* is the leading authority on the question. One Holmes was confined under a warrant issued by the Governor of Vermont directing the sheriff of a certain county to deliver him to the agents of the Dominion of Canada in order that he might be thence conveyed and dealt with according to the laws of the Dominion. On *habeas corpus* proceedings the Supreme Court of Vermont sustained the action of the Governor. A writ of error was taken to the Supreme Court of the United States, and although the decision there rendered was that the court had no jurisdiction to review the ruling of the Supreme Court of a State on *habeas corpus* proceedings, for confinement under a State statute, Mr. Chief Justice Taney, in an opinion concurred in by Justices Story, M'Lean and Wayne, said:

> "The use of all these terms 'treaty', 'agreement', 'compact', show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection between a State and a foreign power: and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties. * * *
>
> "And if the authorities of Vermont agree to deliver him, and the authorities of Canada agree to accept, is not this an agreement between them? From the nature of the transaction the act of delivery necessarily implies a mutual agreement. * * *
>
> "Upon the whole, therefore, my three brothers, before men-

[2] See Holmes *v.* Jennison, 14 Pet. 540; *Ex Parte* Holmes, 12 Vt. 631; People *v.* Curtis, 12 N. Y. 321, 10 Am. Rep. 483.

[3] Cases cited *supra;* STORY, CONSTITUTION, § 1355.

tioned, and myself; after the most careful and deliberate examination; are of opinion, that the power to surrender fugitives, who, having committed offenses in a foreign country, have fled to this for shelter, belongs under the Constitution of the United States, exclusively to the Federal Government; and that the authority exercised in this instance by the Governor of Vermont, is repugnant to the Constitution of the United States."

On the strength of this decision, the Supreme Court of Vermont was satisfied that, by a majority of the justices of the Supreme Court of the United States, it was held that the power claimed to deliver up Holmes did not exist; accordingly he was discharged, the decision being regarded as binding by the Supreme Court of Vermont.[4]

In New York there formerly existed a statute providing for the surrender of fugitives by the Governor on the demand of a foreign power. In a leading case in that State the Governor issued a warrant, under the authority of such statute, to the sheriff of the county of New York, commanding him to surrender one Vogt to the properly constituted Belgian authorities. Vogt was charged with the commission of crimes near Brussels and was to be conveyed there for trial. The Supreme Court of New York decided that the statute under which the Governor asserted authority for his act was utterly void as being in conflict with the Constitution of the United States. Chief Justice Church, speaking for the court, said:[5]

"Agreements of this character by the states with foreign powers, imply intercourse and arrangement, which were designed to be prohibited as much as strictly legal contracts. * * * I am of the opinion that the act of the legislature is within the evils intended to be prevented, and is a violation of the express provision of the Constitution of the United States against making agreements with foreign powers."

In both the New York and Vermont cases, it was argued that such a statute was valid as being an attempt by a State to remove undesirable persons under the exercise of the police power, and in both cases it was held that such action as the statute contemplated was not a valid exercise of the police power.

Upon survey of the authorities cited, we believe that § 5060 of the Virginia Code is in conflict with the United States Constitution and therefore void.

W. R. A.

---

[4] *Ex parte* Holmes, *supra.*
[5] People *v.* Curtis, *supra.*